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## Facsimile Cover Sheet

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Date: 04/29/97  
Pages including this  
cover page: 6

RECEIVED  
APR 29 1997  
STEVE MADOFF

DVD  
legislation

Comments: Steve, please give me a call.

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cc: 4/29  
Leslie B.  
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## TELECOPIER COVER SHEET

[If you do not receive any of the following pages, please contact Elizabeth Ahmad at 703/907-7612.]

Total Number of Pages: 5 (including cover sheet)

<b>TO:</b>	Jason Berman	Recording Industry Assoc. of America	202/775-7253
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	Robert Holcymann	Business Software Alliance	202/872-5501
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 <b>CC:</b>	 Bruce Lehman	 Patent and Trademark Office	 703/305-8664
 <b>FROM:</b>	 Gary Shapiro		
	President		
 <b>DATE:</b>	 April 28, 1997		
 <b>RE:</b>	 LEGISLATIVE DRAFTS RE WIPO IMPLEMENTING LEGISLATION		

Since we met on March 31, we have had our ups and downs in trying to arrive at a consensus with respect to draft legislation. The day after the meeting, I circulated working drafts of both WIPO Implementing Legislation and a Digital Recording bill. Since then, the focus has been entirely on WIPO Implementing Legislation.

As you know, for several weeks there were multi-industry discussions. Then there were submissions to the PTO of drafts supported by only some of the negotiation participants. I am pleased that this past Friday there was a meeting to which all sides were invited, and that the CEMA/HRRC drafters put on the table a new draft that they are prepared to recommend to CEMA and HRRC. I have been informed that this draft was welcomed by the other parties present as a serious and good faith offer to reach agreement on certain issues that have, thus far, prevented us from reaching a multi-industry consensus draft in response to Commissioner Lehman's request.

Our new draft is based on a proposal by RSA, MPAA and RIAA that was forwarded to Commissioner Lehman last week and only subsequently shown to us. (We understand that it was shown to ITI in advance but has not received any ITI endorsement.) Our draft leaves this

"BSA" version intact — to the extent possible — and adds clarifying and limiting definitions, with certain other revisions. But neither our proposal nor the one it would amend yet represents a private sector consensus.

We have very serious substantive concerns over the BSA/MPAA/RIAA draft if it were left unchanged. Its language leaves open to interpretation important questions of potential liability for manufacture, sale and use of integrated and multipurpose products that are now entirely bona fide and legal. We have set forth, below, some key questions which we believe must be resolved before any multi-industry compromise is possible. Further below is the text of our proposed alternative, which we think resolves these questions in a manner appropriate to WIPO implementing legislation.

I want to emphasize that I remain committed to a constructive and substantive process for achieving industry consensus on legislative drafts. Two points, in particular, should be well understood:

- 1) We are prepared to support WIPO Implementing Legislation of appropriate scope irrespective of progress, or lack thereof, on Digital Recording legislation.
- 2) As we have for some time, we continue to assert the need for expeditious action on Digital Recording legislation. Indeed, in this more specific context, we are prepared to support certain provisions that, we believe, cannot be legislated with sufficient precision and predictability in the broad context of WIPO Implementing Legislation.

#### HRRC/CEMA Questions Re BSA/MPAA/RIAA Proposal

##### Section 1.a.

- 1) Does the phrase "ordinary course of its operation" imply that the user's device must have been designed to accommodate the technical protection measure? Is failure to have designed the user device to accommodate the technical protection measure ever actionable under sections (1), (2) and (3), read together?
- 2) Does this section apply only to works as to which there is no lawful access whatever, or does it also apply in the circumstance where one has acquired a lawful copy or transmission of a work?

##### Section 1.b.

- 1) Does "knowingly" modify the act of manufacture, import, etc., or something else? (One is presumed to be aware of engaging in the act of manufacture or import.)
- 2) Is it required that the person chargeable under this subsection have actual knowledge of the particular activity that is being assisted, and the particular person doing it? Or is it enough to "know" that the product being manufactured, imported, etc. is (a) capable of such use, and (b)

1) Why is it necessary explicitly to specify the application of Section 337 in this provision?

### Section 3.

5) What protects the manufacturer and seller of "professional" devices with respect to liability under this provision?

4) Would this section make manufacture or sale of a CSS chip illegal but for specific authorization of its use?

3) Would this section make illegal the manufacture or sale of a product that is included for — and has — legitimate uses, such as a video mixer, but as a byproduct of such legitimate use, does not carry — or removes — copy control related information?

B) If, after the passage of this provision, future models for versions of all of these products did not contain chips or other circuitry or components that respond to those signal protection technologies, should the failure to include such circuitry or components be grounds for a cause of action under this provision?

A) Would the (1) design, or (2) choice of components for any of the above products ever become actionable, or raise issues of fact in a court proceeding, if the proposed provision were to become law?

\*Computers generally do not recognize digital or analog signal-marking technologies that are widely recognized by consumer electronics devices.

\*Computer analog input circuits generally do not respond to Macrovision AGC.

\*Certain VHS format VCRs do not respond to Macrovision AGC, while others do.

\*8mm analog VCRs' basic design is such that the Macrovision "AGC" process has no effect.

2) Under what envisioned circumstances, if any, might the sale of a video recording device or a general purpose computer become actionable?

1) Under this section, can the choice of one component rather than another in the design of an integrated or multipurpose product be actionable? If so, precisely under what circumstances?

### Section 2.

likely to be used by some person at some time (e.g., via an application program or code widely available over the Internet)?

- has only limited commercially significant purpose or use other than to avoid, bypass, remove, deactivate, impair or otherwise circumvent protection afforded by "an effective" technological protection measure that, in the ordinary course of its operation, [effectively] protects a right under Title 17 of a copyright owner in a work or a portion thereof.
- (i) is marketed, or is primarily designed or produced, to, or
- (ii) has only limited commercially significant purpose or use other than to avoid, bypass, remove, deactivate, impair or otherwise circumvent protection afforded by "an effective" technological protection measure that, in the ordinary course of its operation, [effectively] protects a right under Title 17 of a copyright owner in a work or a portion thereof.

2. No person shall manufacture, use, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component, or part thereof that:

- (a) No person shall [knowingly] manufacture, use, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component, or part thereof [that] "with the specific intention of" "assist[ing]" another in performing [the] "an" activity prohibited by paragraph 1(a).

- (b) No person shall, without the authority of the copyright owner "or the law", decompile, decrypt, or otherwise render accessible a work that incorporates or otherwise utilizes "an effective" technological protection measure that, in the ordinary course of its operation, [effectively] controls access to a work protected under Title 17 by requiring the application "in a user device" of information, or a process or a treatment, authorized by the copyright owner to gain access to the work.

## Implementing Legislation Draft Proposal H.R.C/CEMA Version 4/25/97

- 1) Where is the provision to be codified?
- 2) What are to be the remedies for violation of these provisions? What are to be the provisions with respect to Copyright Management Information?

### General

- 1) How does this provision relate to fair use and other limitations and exemptions available under the Act, e.g., ephemeral reproduction, archiving, etc.? Does this provision overturn Congress's judgment in 1976 with respect to the appropriate scope of copyright protection under Section 106, by confirming additional, separate rights without balancing limitations on the new rights?

### Section 4.

3. The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer or consignee of any technology, product, service, device, component, or part thereof as described in this section shall be actionable under section 1337 of Title 19.

4. Nothing in this section shall affect rights, defenses, limitations or remedies under Title 17.

\*5. Definitions

1) To 'circumvent' means to avoid, bypass, remove, deactivate, or impair the operation of an effective technological protection measure for the purpose of facilitating an act of infringement.

2) An 'effective technological protection measure' means information included with or an attribute applied to a transmission, copy of a work, or phonorecord so as to protect the rights of the copyright owner of such work or portion thereof under this title and which, but for the intervention of conduct made unlawful under this provision, would be effective without any affirmative legal mandate as to design of bona fide integrated or multipurpose products.\*